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No. 90-1708

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of the State of Texas

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PETITIONER'S REPLY MEMORANDUM

WILLIAM J. MURPHY
(Counsel of Record)
ROBERT T. SHAFFER, III
Seventh Floor
100 Light Street
Baltimore, Maryland 21202
(301) 752-1564
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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1. In the opening section of its Opposition, respondent "objects" to this Court's jurisdiction over this case, suggesting that the Petition does not meet the criteria of Supreme Court Rule 10.1(b) and (c). Opp. at 1-2.[1] Petitioner has urged plenary review of this case because the opinion of the Texas Court of Appeals is in conflict with decisions of the United States Court of Appeals for the Third Circuit and the Michigan Supreme Court, as well as numerous decisions of this Court. In arguing that

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[1] Respondent actually cites former Supreme Court Rule 17, which was revised and recodified as Rule 10, effective January 1, 1990.

there is no conflict, respondent has not even referred to the Court of Appeals' decision in *Spencer* v. *Honorable Justices of Supreme Court of Pennsylvania*, 760 F.2d 261 (3d Cir. 1985), *aff'g*, 579 F. Supp. 880 (E.D. Pa. 1984), nor to the Michigan Supreme Court's decision in *Matter of Jaques*, 407 Mich. 26, 281 N.W.2d 469 (1979). Under both those decisions, petitioner's communications in Scotland, seeking to establish a dialogue with Scottish solicitors about the possible referral of Piper Alpha cases, could not have been subjected to bar discipline. *See* Pet. at 22-23 & n.20. As for this Court's prior decisions, respondent makes passing reference only to *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), ignoring all subsequent developments in this important area of First Amendment jurisprudence. The Texas Court of Appeals in this case decided some of the constitutional issues raised by petitioner, and deferred other issues to the Texas Supreme Court and to this Court. *See* App. A, at 6a-7a. Yet respondent inexplicably pretends that these issues are not presented by this case.

2. Respondent contends that petitioner has not complied with this Court's former Rule 21(h), now set forth in Rule 14.1(h). *See* Opp. at 3-4. Yet the Petition describes in ample detail how the District Court and Court of Appeals resolved the constitutional questions presented herein. *See* Pet. at 14-20. Although respondent does not explicitly contend that the federal issues were not raised and decided in the court of first instance and in the appellate court, petitioner is reluctant to let respondent's invocation of Rule 14.1(h) stand unchallenged.

Petitioner raised the First Amendment issues posed by the disciplinary proceedings in his "Original Answer and Opposition to Motion to Revoke Probation," which was filed in the District Court on September 20, 1988. In Part V, B of that Answer petitioner argued that he could not be disciplined based on the statements he made concerning the Piper Alpha tragedy because those commu-

nications all were directed toward establishing contact with Scottish solicitors rather than the victims themselves, and because his statements were not false or misleading. Petitioner expressly asserted that any contrary reading of the Texas Disciplinary Rules would violate his First Amendment rights. The District Court rejected these contentions *See* App. D, at 44a-49a. Petitioner reiterated these arguments in the Points of Error numbered One through Eleven in his brief filed in the Court of Appeals. Each of these points of error was overruled. *See* App. A, at 5a-9a.

Petitioner also raised the due process issues posed by respondent's effort to sanction him for his acceptance and referral of the *Hartman* matter in his Original Answer, at Part V, A, and in a Supplemental Answer filed in the District Court on October 17, 1988. The District Court rejected these constitutional arguments, as well. *See* App. D at 43a-44a, 49a. The issues were presented to the Court of Appeals in Points of Error Twelve through Twenty of petitioner's Brief, and were rejected by that Court as well. *See* App. A, at 10a-13a.

Respondent's veiled suggestion that the issues presented in this Petition were not properly preserved in the courts below is not borne out by the record, which demonstrates that petitioner challenged the constitutionality of the State Bar's actions against him on federal free speech and due process grounds at every stage of the proceedings below. The respondent's invocation of Rule 14.1(h) is frivolous.

3. In its Statement of the Case, Opp. at 6, respondent attempts further to sully petitioner's reputation by repeating the unfounded and unproven allegations of the 1987 disciplinary proceedings it instituted against the petitioner. Those proceedings form the backdrop to this Petition, but the scurrilous allegations advanced by re-

spondent in 1987 have nothing to do with the issues raised herein.[2]

4. Respondent's principal argument presented in its Reasons for Denying the Writ, respecting petitioner's First Amendment claims, is that there is nothing for this Court to review because the Texas courts found petitioner's Piper Alpha statements to be false and misleading. Opp. at 12-22. Respondent, like the Court of Appeals, does not address the sophistication of petitioner's intended audience of Scottish solicitors, nor the holding of this Court in *Bates* that "the determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." 433 U.S. at 383, n.37. *See* Pet. at 22.

Respondent likewise does not address the decisions of the Court of Appeals for the Third Circuit in *Spencer*, and the Michigan Supreme Court in *Jaques*, which applied *Bates*' analysis and prohibited bar discipline from being imposed against attorneys based on allegedly misleading communications made to other attorneys and to a sophisticated union business agent. *See* Pet. at 22-23.

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[2] Respondent also asserts in its Statement of the Case, Opp. at 9, that the Motion to Revoke Probation that it filed on September 12, 1988 raised the same issues as the Motion to Conduct Oral Hearing filed on July 19, 1988. Although this factual assertion is not directly pertinent to the questions presented in the Petition, it is false. In the Motion to Conduct Oral Hearing, respondent and petitioner's custodian, Hartley Hampton, suggested that petitioner had "solicited" survivors of the Piper Alpha disaster. App. J., at 71a-72a. In the later Motion to Revoke Probation, respondent abandoned the allegations of improper solicitation, and alleged for the first time that the news release, newspaper advertisement, and letter to victims and their families were "false and misleading." *See* App. I, at 67a-69a. The Court of Appeals accepted respondent's specious argument that petitioner was placed on notice of the principal charges against him by the Motion to Conduct Oral Hearing. *See* App. A, at 13a. This Court should not be misled so readily by respondent's propensity to misstate the record.

Respondent does not address the failure of the Texas courts in this case to analyze the alleged misleading nature of petitioner's Piper Alpha statements based on "an independent examination of the whole record" as required by this Court's decisions in *Peel* v. *Attorney Registration & Disciplinary Comm'n*, —— U.S. ——, ——, 110 S.Ct. 2281, 2291-92 (1990), and *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 463 (1978). *See* Pet. at 23-24.

Instead, respondent itself has ignored and distorted the record, and mouthed the same conclusionary reasoning offered by the Texas Court of Appeals to explain why petitioner's statements were false and misleading. *See* Opp. at 16-22.[3] Respondent goes so far as to include in its litany of petitioner's alleged misleading statements, comments that he made during an interview with the media in Aberdeen, Opp. at 16, 19-20, despite the fact

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[3] The body of the Brief of Respondent In Opposition to Petition for Writ of Certiorari, filed in this Court, is drawn *word-for-word* from the body of the Reply to Application for Writ of Error, which respondent filed in the Supreme Court of Texas on May 7, 1990. Respondent's lack of initiative in formulating its Opposition in this Court explains why the State Bar has devoted so many pages to issues, including issues of state law, that petitioner has not raised in this Court, and has failed to address the precise due process question that petitioner has presented to this Court. *See, e.g.*, Opp. at 25-28 (addressing the question whether petitioner should have been held accountable for the actions of Kelly Newman); Opp. at 28-29 (discussing the timing of the District Court's evidentiary hearing); Opp. at 29-36 (discussing whether or not the Hartmans were "new" clients); Opp. at 37-38 (discussing whether a three year suspension is a sanction authorized by Texas law). Petitioner presented these issues to the Texas Supreme Court; he did not raise them as questions presented in his Petition to this Court.

The fact that the State Bar of Texas did not even take the time and effort required to prepare an Opposition in this Court that addresses the federal constitutional questions presented by petitioner's suspension from the bar, lends further credence to petitioner's contention that neither the State Bar nor the Texas courts ever devoted adequate attention to this Court's decisions, or to the constitutional rights of petitioner that were infringed by the disciplinary proceedings and by the harsh sanctions imposed against him.

that those comments were *not* included within the charges filed by the State Bar as grounds for revoking petitioner's probation. *See* App. I, at 67a-69a.[4]

5. In support of its argument that petitioner's Piper Alpha statements were false and misleading, respondent ascribes intentions to petitioner and to John O'Quinn that are flatly contradicted by the record, or totally devoid of evidentiary support. For example, respondent asserts that "O'Quinn had not authorized . . . Musslewhite to speak on his behalf" to the Scottish solicitors. *See* Opp. at 16. This assertion is not consistent with O'Quinn's testimony that he *had* authorized petitioner to "tell the solicitors that if they wanted to have cases filed in Texas . . . that I was interested in working with them . . . or in taking such cases on a referral." *See* Pet. at 8, quoting Tr. of Oct. 17, 1988, at 190. Respondent's repeated assertion that petitioner was attempting to secure clients for O'Quinn, and was engaged in a sort of "bait and switch" tactic with the solicitors, *see* Opp. at 24-25, is a figment of respondent's active imagination, unsupported by record citation or by any record evidence.

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[4] Respondent contends that during the "press conference" in Aberdeen, petitioner "estimated a range of recovery for wrongful death cases between $1 million and $5 million in Texas State courts," and that such "predictions of future success . . . clearly create an unjustified expectation about results that Musslewhite could achieve." Opp. at 19-20. The record discloses that petitioner made that estimate of a range of recovery in response to a question from a Scottish television news reporter. In the same response, however, petitioner told the reporter: "Again I want to emphasi[ze], no lawyer can guarantee recovery of any amount to any client and I wouldn't want any client to have false hopes, but I'm just trying to give you some estimate of what the ranges are." DX 3; Tr. of Oct. 17, 1988, at 250-55. It could fairly be argued that for the State Bar to rely on petitioner's statements during this interview, and to contend in this Court that they contained a misleading prediction of future recoveries, without including petitioner's express disclaimer quoted above, is misleading. In fact, respondent has made a communication to this Court that "omits a material fact necessary to make the statement considered as a whole not materially misleading." Texas DR 2-101(A)(1).

Respondent further asserts that "in truth" petitioner did not reveal the terms of the Agreed Judgment to any of the Scottish solicitors until after publicity about petitioner's probation had "surfaced" in the Scottish press. *See* Opp. at 25. "In truth," however, the only evidence concerning the nature of petitioner's disclosures to the solicitors was the testimony offered at trial by petitioner himself. Petitioner testified, and his testimony was uncontradicted, that he disclosed the terms of the Agreed Judgment to several solicitors *before* it was reported in the press. *See* Pet. at 11; Tr. of Sept. 20, 1988, at 34, 42-43; Tr. of Oct. 17, 1988, at 271-73.

It is more than a bit ironic that the State Bar of Texas would attempt to mislead this Court about the record in a case concerning the factual basis for the State Bar's assertion that petitioner had published false and misleading communications in violation of the Bar's Disciplinary Rules. It bears repeating that essentially the *only evidence* presented by respondent to support its charge that petitioner attempted to mislead anyone is contained in the text of the three Piper Alpha communications that were used in an effort to establish a dialogue between petitioner's team of Texas attorneys and the solicitors for the Piper Alpha victims. That this was the purpose of the three communications is plain from the face of those documents; that they did not contain "false and misleading" statements is equally plain. The essential facts from which this Court may decide the important First Amendment issues presented by this case all are comprised within the three communications set forth in six pages of the Appendix, at 75a-80a. This Court should not permit respondent to succeed in its transparent effort to distort the record, and thereby divert this Court's attention from those issues.

6. Respondent's arguments with respect to the due process violations inherent in its treatment of the *Hartman* matter are difficult to answer, because respondent

simply has not addressed the central points raised in the Petition. It is undisputed that Hartley Hampton, the custodian appointed by the District Court to monitor petitioner's compliance with the Agreed Judgment, told petitioner that he had "no problem" with petitioner's handling of the Hartmans' case, and his referral of those clients to Mr. Mansulla. *See* Pet. at 12, 29-30. In spite of that fact, the State Bar acted to revoke petitioner's probation based in part on the actions approved by Mr. Hampton. The District Court, which appointed Mr. Hampton and which later concluded that "[a]ll actions of Hartley Hampton have been proper and authorized by order of this Court," App. D, at 49a, nonetheless suspended petitioner from the bar for following Mr. Hampton's advice.

In addressing itself to the due process question, respondent never mentions Mr. Hampton's advice. Most of the due process "analysis" contained in the Opposition consists of an effort to refute arguments that petitioner did not include in the questions presented to this Court. *See* note 3 *supra*.

7. Not content with simply side-stepping the issues, respondent also misstates the record concerning the *Hartman* matter. The State Bar's contention that "Musslewhite filed the [*Hartman*] lawsuit prior to associating Mr. Mansulla," Opp. at 34, is blatantly false. The record facts concerning petitioner's dealings with the Hartmans and his referral of their case to Mr. Mansulla are accurately summarized, with appropriate record citations, in the Petition, at pages 11 to 13. The District Court ignored this uncontradicted evidence, as did the Court of Appeals. *See* Pet. at 12, n.9. Respondent apparently feels no compunction about attempting to mislead this Court, as well, into accepting as "truth" its distortions of the record.

CONCLUSION

Respondent has shown its disregard for this Court by filing an Opposition that is drawn, *in haec verba*, from papers it filed in the Supreme Court of Texas, and that obviously fails to address the questions presented in the Petition. Respondent has shown its continuing disregard for petitioner, a member of its bar, by misstating the record facts in a blatant attempt to divert this Court's attention from the important constitutional issues petitioner seeks to present for review. Despite the misleading contentions of respondent to the contrary, these federal constitutional issues were raised and preserved in the Texas courts, and they fully warrant this Court's plenary review. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM J. MURPHY
(Counsel of Record)
ROBERT T. SHAFFER, III
Seventh Floor
100 Light Street
Baltimore, Maryland 21202
(301) 752-1564
Counsel for Petitioner